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4 **IN THE SUPREME COURT**
5 **STATE OF ARIZONA**

6
7 PETITION TO AMEND RULE 35(b),
ARIZONA RULES OF THE
8 SUPREME COURT

Supreme Court No. R-08-0016
Petitioner's Reply

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10 Pursuant to Arizona Supreme Court Rule 28(D)(2), the State Bar of
11 Arizona ("SBA") respectfully submits this response to the comments submitted
12 regarding the SBA's Petition to Amend Rule 35(b) of the Rules of the Supreme
13 Court to include certain aspects of Indian law as a potential test subject on the
14 Arizona State Bar Examination (hereinafter the "Bar Examination").

15 **I. COMMENTS RECEIVED ON PETITION**

16 A total of twenty-seven comments were received on the Petition. All but
17 one comment supported the Petition and the subsequent inclusion of certain
18 aspects of Indian law on the Bar Examination. Comments in support of the
19 Petition were submitted by a variety of practitioners, including the current
20 Governor of the State of Arizona, the former Governor of the State of Arizona,

1 the Arizona Attorney General, the United States Attorney for the District of
2 Arizona, the Honorable Judge William Canby of the Ninth Circuit Court of
3 Appeals, the Honorable Judge Patrick Irvine of the Arizona Court of Appeals, the
4 Deans of Arizona law schools, and many other respected Arizona practitioners
5 and scholars. The SBA echoes the arguments made in the comments supporting
6 the Petition and will not reiterate them in detail here. This response instead
7 focuses on the issues raised by the lone comment that did not support the Petition.

8 The issues raised by the dissenting comment are addressed in detail below.
9 It should be noted that, although the comment was unsupportive of the Petition,
10 the new comment itself does not state any substantive reason for its non-support.
11 Instead, the comment referenced a prior opinion articulated by the commenter in
12 2005. It is unclear whether the commenter sought to determine if any new
13 evidence or arguments had arisen since the commenter last considered the issue.
14 Accordingly, this response replies to the concerns incorporated into the
15 unsupportive comment, which the commenter first articulated in 2005.

16 **A. Indian Law as a Sophisticated and Complex Field**

17 One of the reasons cited against testing Indian law on the Bar Examination
18 is that it is a sophisticated and complex field. The same could be said about many
19 subject areas of the law, including those currently tested, such as Commercial
20 Paper. The Petition does not ask that the Bar Examination test on the fine points

1 of Indian law, just as the Bar Examination does not test on the fine points of
2 Secured Transactions. The Petition specifically requests that the Bar
3 Examination test jurisdiction (tribal, state and federal) and tribal sovereign
4 immunity. These are broad areas which regularly come up in legal practice in a
5 state that has twenty-two Indian tribes where over one quarter of its land base is
6 tribal land. The Petition requests that the Bar Examination test basic knowledge
7 of these areas, something attorneys in Arizona should have in order to effectively
8 serve their clients. Where, and even if, a suit may be filed goes directly to the
9 core competency of any attorney; and, in a state like Arizona, that includes tribal
10 jurisdiction and tribal sovereign immunity.

11 Indian law is currently tested on the bar examinations in South Dakota,
12 Washington, and New Mexico. New Mexico began testing Indian law in
13 February 2003, and the states of Washington and South Dakota followed suit by
14 introducing Indian law as a test subject starting with the July 2007 bar
15 examination. Notably, since the introduction of Indian law topics as test subjects
16 on these states' bar examinations, there is no evidence to suggest a significant
17 reduction in passage rate for those who sit for bar examinations that include
18 Indian law. In fact, the National Conference of Bar Examiners website shows
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1 that passage rates for all three states have remained consistent since Indian law
2 became a testable subject on their bar examinations.¹

3 **B. Fair Notice**

4 Another reason cited against testing Indian law on the Bar Examination is
5 that the subject sweeps too broadly, touching upon Indian law aspects of
6 constitutional law, jurisdiction, criminal law procedure, and conflicts of law.
7 This argument does not accurately state the intent of the Petition, which
8 specifically requests that the limited subject areas of jurisdiction (tribal, state,
9 federal) and tribal sovereign immunity be tested. Moreover, the other states that
10 test Indian law have even broader testable areas, and these have been
11 implemented with success. For example, the Washington State Bar Exam tests
12 “Indian Law/Tribal Sovereign Immunity.”² The New Mexico State Bar
13 Examination tests “Indian law, including subjects such as federal Indian law,
14 criminal and civil jurisdiction in Indian country and Indian child welfare act
15 under state and federal law.”³ The South Dakota State Bar Examination tests
16 Indian law in a manner that “includes basic principles of federal Indian law,
17 including but not limited to civil and criminal jurisdiction, the Indian Civil Rights
18 Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act. It

19 ¹ <http://www.ncbex.org/bar-admissions/stats/>.

20 ² http://www.wsba.org/lawyers/licensing/bar_examination_instructions_2.htm.

³ <http://www.nmexam.org/rules/rules203.htm>.

1 does not include tribal laws or customary laws.”⁴ Due to the fact that three
2 jurisdictions test Indian law on their bar examinations, bar preparation and bar
3 study programs already have materials available to help bar examinees prepare to
4 be tested in the area of Indian law.

5 In addition, should Indian law become a testable subject on the Bar
6 Examination, the Petition recommends that the Court establish a “grace period”
7 which would establish that the July 2011 Bar Exam would be the earliest
8 opportunity to have Indian law subjects tested in the manner provided for in the
9 Petition. Such a “grace period” provides ample opportunity for law students to
10 become acquainted with the subject matter and to permit bar exam preparatory
11 classes to incorporate the subject matter into their curricula.

12 **C. Not a Required Course in Arizona Law Schools**

13 Another argument posed against testing Indian law on the Bar Examination
14 is that it is not a required course to graduate. Indian law is offered at all three
15 Arizona law schools, but it is not a required course. Similarly, the subjects of
16 Evidence, Wills and Trusts, and Community Property are not required classes at
17 all law schools in Arizona, yet all are tested on the Bar Examination. In addition,
18 certain aspects of constitutional law are tested on the Bar Examination but are not
19 required coursework to graduate from law school. The fact that Indian law is not

20 ⁴ <http://www.sdjudicial.com/index.asp?title=regulations&category=barexamination&nav=42>.

1 a required course should not preclude it from being a tested subject on the Bar
2 Examination. Again, bar preparation materials can assist those who did not take
3 Indian law in law school, as they already do for students who declined to take
4 Wills and Trusts, Community Property, Evidence, Secured Transactions or
5 Commercial Paper. Alternatively, students can choose to take Indian law as an
6 elective as they currently do with the other subjects not required for graduation
7 but tested on the Bar Examination.

8 **D. No New Evidence Since 2005**

9 The comment which did not support the Petition claims that no new
10 evidence or arguments have come forward since 2005. This is simply incorrect.
11 As stated above, since 2005, two new states have added Indian law to their bar
12 examinations: South Dakota (where Indian law is a mandatory test subject) and
13 Washington. Both states have sizable tribal communities, although not as sizable
14 as Arizona's. A brief review of bar examination pass rates for South Dakota,
15 Washington, and New Mexico shows no significant deviation in passage rates
16 after Indian law became a testable subject.⁵ Further, even more jurisdictions,
17 including Oklahoma, Michigan, Idaho, Oregon, Montana and Wisconsin, are
18 considering Indian law as a testable subject for their bar examinations. As tribal
19 governments and economies grow and expand, and as tribal, state and federal

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⁵ <http://www.ncbex.org/bar-admissions/stats/>.

1 relationships become more entwined, the number of cases and controversies
2 arising out of these relationships will inevitably grow; and the need for Arizona
3 attorneys to have a basic familiarity with the core issues will be essential to their
4 ability to adequately represent their clients.

5 **II. CONCLUSION**

6 The discrete areas of Indian law which the Petition has proposed for
7 inclusion – the issues of jurisdiction and tribal sovereign immunity – go to the
8 core competencies of attorneys practicing in Arizona, a state which has such rich
9 tribal resources. Including these issues as potential test subjects will not require
10 future applicants to acquire knowledge about Indian law that is any more complex
11 or sophisticated than what they must acquire with any other subject that is not
12 required course work, but which is testable subject matter, such as Wills and
13 Trusts or Community Property. Furthermore, with three other states already
14 testing Indian law, there are ample study materials available through bar
15 preparation courses that can be quickly adapted for Arizona's examination well
16 before the proposed grace period under the Petition would be set to expire prior to
17 the July 2011 examination.

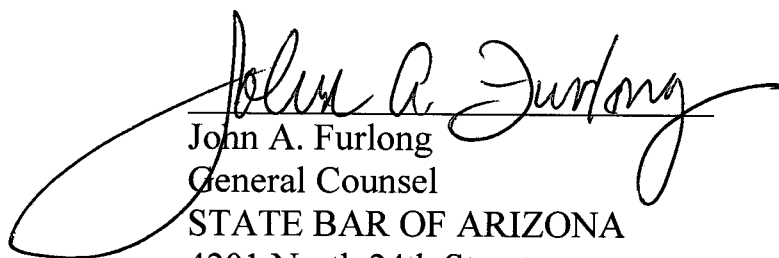
18 Nevertheless, and despite the lone dissenting comment, the overwhelming
19 weight of the arguments now before the Court clearly shows that the time has
20 come to add Indian law as a testable subject on the Bar Examination. The

1 arguments set forth in the Petition itself, and the letters and resolutions of support
2 that were submitted as attachments, provide an abundance of evidence to support
3 such a change to Rule 35(b). Perhaps the most significant indication of the
4 timeliness of this Petition can be found in the well-reasoned and thoughtful
5 comments which were submitted from the members of the SBA at large –
6 individuals with a wealth of experience practicing law in Arizona. For at the
7 heart of this Petition is the improvement of the practice of law in Arizona through
8 the increased competency of future applicants, which will benefit the SBA, the
9 judicial system, and all Arizonans.

10 For these reasons, the inclusion of Indian law is an essential step forward in
11 the continued development of the practice of law in Arizona.

12 The SBA respectfully reiterates its request that the Supreme Court grant the
13 Petition to Amend Rule 35(b) to include Indian law as a testable subject on the
14 Bar Examination, and thanks the Court for its thoughtful consideration of this
15 important matter.

16 **RESPECTFULLY SUBMITTED** this 30th day of June, 2009.

17 
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1 Electronic copy filed with the
2 Clerk of the Supreme Court of Arizona
3 this 30th day of June, 2009.

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